



Oliver Beiersdorf
Direct Phone: +1 212 549 0415
Email: obeiersdorf@reedsmith.com

599 Lexington Avenue
New York, NY 10022-7650
Tel +1 212 521 5400
Fax +1 212 521 5450
reedsmith.com

January 25, 2019

VIA ECF

The Honorable Kiyo A. Matsumoto
The United States District Court for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

RE: Murdock, *et al.*, v. United Airlines, Inc., *et al.*, Civil Action No. 1-18-CV-06741 KAM/SMG
RS Ref: 760270.60066

Dear Judge Matsumoto:

We are counsel for United Airlines, Inc. ("United") in this action and are writing to request a pre-motion conference in accordance with Your Honor's Individual Practices in advance of filing a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). As detailed in the factual and legal analysis provided below, United is confident that Plaintiff Eric Murdock and Plaintiff Brenda Williams' ("Plaintiffs") Complaint fails to state a valid cause of action against United.

I. Introduction

Plaintiffs' allegations, even if taken as true, show only that Plaintiffs entered into a quarrel with a flight attendant on their flight from Las Vegas, Nevada to Newark, New Jersey based on Plaintiff Murdock's effort to sit in an upgraded seat – one for which he did not contract – after he boarded the flight. Plaintiffs' allegations reveal that the dispute began when Plaintiff Murdock attempted to move into an upgraded exit row seat, a seat that carried a premium upgrade price, even though he had not contracted for such a seat. There are no allegations that Plaintiffs were denied boarding, denied their seats, or even denied the opportunity to purchase an upgraded seat before boarding. Moreover, the allegations do not show that any tort was committed and do not set forth facts evidencing any discrimination.

The allegations reveal that both Plaintiffs sat in their assigned seats – the seats they purchased – for the flight. United did not have a contractual obligation to provide Plaintiff Murdock with a different, upgraded seat after he boarded. United thus did not discriminate against Plaintiff Murdock's contractual rights. Moreover, Plaintiff Williams does not allege any facts showing how United discriminated against her contractual rights.

As for Plaintiffs' state law tort claims, Plaintiffs do not allege any physical injuries, and on the basis of conclusory allegations of embarrassment and emotional distress alone, Plaintiffs seek \$10 million dollars in damages. Plaintiffs never provided any facts supporting their claim for emotional distress damages. Even taking the allegations as true, although Plaintiff Murdock and Williams may have had an unsatisfactory customer experience, as detailed below, Plaintiffs do not state valid claims.

The Honorable Kiyo A. Matsumoto
January 25, 2019
Page 2

II. Legal Analysis

A. Plaintiffs' Discrimination Claims

Plaintiffs' claim under 42 U.S.C. § 1981 should be dismissed because Plaintiffs do not allege facts evidencing discrimination or an intent to discriminate and do not allege facts demonstrating discrimination concerning one of the statute's enumerated activities. To establish a claim under § 1981, a plaintiff must allege that: "(1) plaintiff[] [is a] member[] of a racial minority; (2) [defendant's] intent to discriminate on the basis of race; and (3) discrimination concerning one of the statute's enumerated activities." *Brown v. City of Oneonta*, 221 F.3d 329, 339 (2d Cir. 2000). "Those enumerated activities include the rights 'to make and enforce contracts....'" *Id.* Plaintiffs claim United discriminated against their right to make and enforce contracts, but Plaintiffs do not allege any facts evidencing discrimination or that United intended to discriminate against Plaintiffs on the basis of their race. Rather, Plaintiffs' allegations reveal that both Plaintiffs sat in their assigned seats – the seats they contracted for.

Likewise, Plaintiffs' Title VI claim should be dismissed because Plaintiffs do not allege any facts showing discrimination, and Plaintiffs do not allege any facts establishing a nexus between a program receiving federal financial assistance and their conclusory allegations of discrimination. "To state a claim for a violation of Title VI, a 'plaintiff must allege that: (1) [defendant] received federal financial assistance, (2) [plaintiff] was an intended beneficiary of the program or activity receiving the assistance, and (3) [defendant] discriminated against [plaintiff] on the basis of race, color, or national origin in connection with that program or activity.'" *Shin v. Am. Airlines Grp., Inc.*, No. 17-CV-2234-ARR-JO, 2017 WL 3316129, at *2 (E.D.N.Y. Aug. 3, 2017) (emphasis within). In order to allege a Title VI claim, a plaintiff must identify the "program or activity receiving Federal financial assistance". *James v. Am. Airlines, Inc.*, 247 F. Supp. 3d 297, 306 (E.D.N.Y. 2017) (dismissing Title VI claim). "A claim under Title VI cannot proceed without that requisite nexus." *Id.* Plaintiffs fail to allege any United program receiving financial assistance; that Plaintiffs were the intended beneficiaries of any such program; and that Plaintiffs were discriminated against in connection with such a program.

B. Plaintiffs' State Law Claims

1. New Jersey law applies in the event of a conflict

New Jersey law should apply to Plaintiffs' state law tort claims in the event of a conflict of laws. Under New York's choice of law rules, in the absence of a conflict, New York law will apply. *Wall v. CSX Transp., Inc.*, 471 F.3d 410, 422 (2d Cir. 2006). If there is a conflict, however, the state with the greatest interest in applying its law will have its law applied. *Spinrad v. Comair, Inc.*, 825 F. Supp. 2d 397, 402 (E.D.N.Y. 2011) (citations omitted). The flight took off from Nevada and landed in New Jersey, where both Plaintiffs are domiciled. New York does not have a connection to the allegations other than serving as the forum for the litigation. Plaintiffs' claims are based on alleged conduct taking place during the flight, after they boarded, and continuing after the flight landed in New Jersey. Nevada's interest in having its law applied was exhausted when the Plaintiffs successfully boarded the flight. *See id.* at 403. In the event of a conflict, New Jersey law should govern because it has the greatest interest in having its law applied.

2. Plaintiffs fail to allege state law tort claims

The Honorable Kiyo A. Matsumoto
January 25, 2019
Page 3

There is no conflict of law on Plaintiffs' assault claims, and under New York law, the assault claims should be dismissed because Plaintiffs' allegations establish that neither Plaintiff was placed in fear of physical contact from the flight attendant. *Girden v. Sandals Int'l*, 262 F.3d 195, 203 (2d Cir. 2001). Plaintiffs' allegation that the flight attendant placed her head close to Plaintiff Murdock would turn every airline flight into an occasion for multiple assaults. And, although the Plaintiffs allege that the flight attendant attempted to grab Plaintiff Williams' phone, they do not allege that the flight attendant attempted to touch or harm her in any way.

Plaintiffs' negligence claim is entirely duplicative of their negligent infliction of emotional distress ("NIED") claim because Plaintiffs seek to recover only for emotional distress. New Jersey law applies to these claims because New Jersey law conflicts with New York law in that it requires allegations of physical injury to state a direct NIED claim. *Falzone v. Busch*, 45 N.J. 559, 569 (1965). Plaintiffs fail to allege that they suffered any physical injury nor does United have a duty to keep Plaintiffs free from a quarrel with a flight attendant during a flight. There is no conflict of laws on Plaintiffs' intentional infliction of emotional distress claim and this claim should be dismissed under New York law because Plaintiffs' allegations do not meet the high threshold for extreme and outrageous conduct necessary to sustain such a claim. Nor do their allegations show they suffered severe emotional distress. *Howell v. New York Post Co.*, 81 N.Y.2d 115, 121 (1993).

There is no conflict of law on Plaintiffs' false imprisonment claim and this claim should be dismissed under New York law because Plaintiffs do not allege any facts demonstrating that United actually confined Plaintiffs or that United intended to confine Plaintiffs. *Broughton v. State*, 37 N.Y.2d 451 (1975). In fact, the Plaintiffs were never arrested. Likewise, there is no conflict of laws on Plaintiffs' breach of contract claim and the claim should be dismissed because Plaintiffs fail to identify the specific provision of the Contract of Carriage they claim was breached, *McGee v. State Farm Mut. Auto. Ins. Co.*, 2011 WL 5409393, at *7 (E.D.N.Y. Nov. 8, 2011), and because Plaintiffs make only conclusory allegations of damage as a result of the breach, *Mariah Re Ltd. v. Am. Family Mut. Ins. Co.*, 52 F. Supp. 3d 601, 611 (S.D.N.Y. 2014). Indeed, the complaint itself makes clear that there was no breach of contract. Both Plaintiffs were seated in their assigned seats. Nor does the applicable Contract of Carriage make any guarantees regarding the availability of seats.

Finally, New Jersey law applies to Plaintiffs' negligent hiring, supervision, training and/or retention claim and the claim should be dismissed because the flight attendant did not commit any underlying tort, and there are no allegations that United knew or had reason to know that the flight attendant had any dangerous propensities. *Di Cosala v. Kay*, 91 N.J. 159, 173 (1982).

We respectfully suggest that United file its motion on February 22, 2019, Plaintiffs file their opposition on March 14, 2019, and United file its reply on March 28, 2019.

We thank Your Honor for considering this request.

ReedSmith

The Honorable Kiyo A. Matsumoto
January 25, 2019
Page 4

Respectfully submitted,


Oliver Beiersdorf

OKB/bt

cc: Gary Port, Esq. (*by ecf and mail*)